



38 CFR Part 3

RIN 2900-AR74

Updating Presumptive Radiation Locations based on the PACT Act

AGENCY: Department of Veterans Affairs.

ACTION: Final rule.

SUMMARY: The Department of Veterans Affairs (VA) is issuing this final rule to amend its adjudication regulations to add more presumptive exposure locations for radiation, as legislated in the Sergeant First Class Heath Robinson Honoring our Promise to Address Comprehensive Toxics Act of 2022 (the PACT Act). The PACT Act expands and extends eligibility for VA benefits for Veterans with toxic exposures, and Sections 401 and 402 specifically ease the evidentiary burden for Veterans who file claims with VA based on radiation exposure in certain locations. This final rule chronicles those sections of the PACT Act in VA regulations.

DATES: This final rule is effective [INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER].

Applicability Date: This final rule merely restates, in VA regulations, provisions of the PACT Act that took effect on August 10, 2022. Pursuant to that statutory authority, the provisions restated in this final rule shall apply to all applications for benefits received by VA on or after August 10, 2022 or that were pending before VA, the United States Court of Appeals for Veterans Claims, or the United States Court of Appeals for the Federal Circuit on August 10, 2022.

FOR FURTHER INFORMATION CONTACT: Bryant Coleman, Regulations Analyst;
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SUPPLEMENTARY INFORMATION:

I. PACT Act Background

On August 10, 2022, President Biden signed into law the PACT Act, Pub. L. 117-168, to improve access to VA benefits for Veterans who were exposed to toxic substances during military service. Specifically, the PACT Act expands and extends eligibility for VA benefits for Veterans with certain toxic exposures. Based on the PACT Act, the following regulations will be updated.

II. Changes Based on Section 401

Section 401 of the PACT Act amends 38 U.S.C. 1112(c)(3)(B) by adding a new clause (v), which adds the cleanup of Enewetak Atoll during the period beginning on January 1, 1977, and ending on December 31, 1980, as a radiation-risk activity. To that effect, VA will add 38 CFR 3.309(d)(3)(ii)(F) to cover the Veterans who participated in cleanup of Enewetak Atoll during this period as radiation exposed Veterans for purposes of presumptions of service connection of certain disabilities by VA. This addition makes VA regulation consistent with 38 U.S.C. 1112(c)(3)(B)(v).

III. Changes Based on Section 402

Section 402 of the PACT Act amends 38 U.S.C. 1112(c)(3)(B) by adding a new clause (vi), which adds participation in nuclear response efforts in the vicinity of Palomares, Spain, during the period beginning January 17, 1966, and ending March 31, 1967, as a radiation-risk activity. To that effect, VA will add 38 CFR 3.309(d)(3)(ii)(G) to cover Veterans who participated in this nuclear response near Palomares, Spain, during this period as radiation exposed Veterans for purposes of presumptions of service connection of certain disabilities by VA. This addition makes VA regulation consistent with 38 U.S.C. 1112(c)(3)(B)(vi).

Additionally, Section 402 of the PACT Act adds a new clause (vii) to 38 U.S.C. 1112(c)(3)(B), which adds participation in nuclear response efforts in the vicinity of Thule Air Force Base, Greenland, during the period beginning January 21, 1968, and ending September 25, 1968, as a radiation-risk activity. To that effect, VA will add 38 CFR 3.309(d)(3)(ii)(H) to cover Veterans who participated in this nuclear response near Thule Air Force Base, Greenland, during this period as radiation exposed Veterans for purposes of presumptions of service connection of certain disabilities by VA. This addition makes VA regulation consistent with 38 U.S.C. 1112(c)(3)(B)(vii).

Administrative Procedure Act

Because this rule merely restates statutory text enacted by Congress, the Administrative Procedure Act's requirements of notice and an opportunity for public comment, and of a delayed effective date, do not apply. See 5 U.S.C. 553(b)(A); *id.* 553(d)(2). To the extent that notice and comment and a delayed effective date would otherwise be required, the Secretary of Veterans Affairs finds good cause under the provisions of 5 U.S.C. 553(b)(B) and (d)(3) to publish this rule without prior opportunity for public comment and with an immediate effective date. Pursuant to 5 U.S.C. 553(b)(B), notice and opportunity for public comment are not required with respect to a rulemaking when an agency finds good cause that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest. Because this rule is limited to incorporating text already enacted by Congress, without change or addition, advance notice and public comment beyond that provided in the legislation itself is unnecessary. Similarly, because this rule merely chronicles in regulation what is already law, there is good cause for the rule to be effective immediately. 5 U.S.C. 553(d)(3).

Executive Orders 12866 and 13563

Executive Orders (EO) 12866 and 13563 direct agencies to assess the costs and benefits of available regulatory alternatives and, when regulation is necessary, to select

regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, and other advantages; distributive impacts; and equity). EO 13563 (Improving Regulation and Regulatory Review) emphasizes the importance of quantifying both costs and benefits, reducing costs, harmonizing rules, and promoting flexibility. The Office of Information and Regulatory Affairs has determined that this rule is a significant regulatory action under EO 12866. The Regulatory Impact Analysis associated with this rulemaking can be found as a supporting document at www.regulations.gov.

Regulatory Flexibility Act

The Regulatory Flexibility Act, 5 U.S.C. 601-612, is not applicable to this rulemaking because notice of proposed rulemaking is not required. 5 U.S.C. 601(2), 603(a), 604(a).

Unfunded Mandates

The Unfunded Mandates Reform Act of 1995 requires, at 2 U.S.C. § 1532, that agencies prepare an assessment of anticipated costs and benefits before issuing any rule that may result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of \$100 million or more (adjusted annually for inflation) in any one year. This final rule will have no such effect on State, local, and tribal governments, or on the private sector.

Paperwork Reduction Act

Although this final rule contains collection of information under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501-3521), there are no provisions associated with this rulemaking constituting any new collection of information or any revisions to the existing collection of information. Specifically, the information collection requirements associated with this final rule are related to the filing of disability benefits claims (VA Form 21-526EZ) as well as Disability Benefits Questionnaires (DBQs) (Groups 3 and 4)

which enable claimants to gather the necessary information from treating physicians as to the current symptoms and severity of a disability. The collection of information for 38 CFR 3.309(d)(3)(ii) is currently approved by Office of Management and Budget (OMB) and has been assigned OMB control number 2900-0747.

Assistance Listing

The Assistance Listing numbers and titles for this rule are 64.101, Burial Expenses Allowance for Veterans; 64.105, Pension to Veterans, Surviving Spouses, and Children; 64.109, Veterans Compensation for Service-Connected Disability; and 64.110, Veterans Dependency and Indemnity Compensation for Service-Connected Death.

Congressional Review Act

Pursuant to Subtitle E of the Small Business Regulatory Enforcement Fairness Act of 1996 (known as the Congressional Review Act) (5 U.S.C. 801 et seq.), the Office of Information and Regulatory Affairs designated this rule as not a major rule, as defined by 5 U.S.C. 804(2).

List of Subjects in 38 CFR Part 3

Claims, disability benefits, health care, pensions, radioactive materials, Veterans, Vietnam.

Signing Authority:

Denis McDonough, Secretary of Veterans Affairs, approved this document on January 23, 2023, and authorized the undersigned to sign and submit the document to the Office of the Federal Register for publication electronically as an official document of the Department of Veterans Affairs.

Jeffrey M. Martin,

Assistant Director,

Office of Regulation Policy & Management,

Office of General Counsel,

Department of Veterans Affairs.

For the reasons stated in the preamble, the Department of Veterans Affairs amends 38 CFR part 3 as set forth below:

PART 3 – ADJUDICATION

Subpart A – Pension, Compensation, and Dependency and Indemnity

Compensation

1. The authority citation for subpart A continues to read as follows:

Authority: 38 U.S.C. 501(a), unless otherwise noted.

2. Amend § 3.309 by adding paragraphs (d)(3)(ii)(F) through (H) to read as follows:

§ 3.309 Disease subject to presumptive service connection.

* * * * *

(d) * * *

(3) * * *

(ii) * * *

(F) Cleanup of Enewetak Atoll during the period beginning on January 1, 1977, and ending on December 31, 1980.

(G) Onsite participation in the response effort following the collision of a United States Air Force B–52 bomber and refueling plane that caused the release of four thermonuclear weapons in the vicinity of Palomares, Spain, during the period beginning January 17, 1966, and ending March 31, 1967.

(H) Onsite participation in the response effort following the on-board fire and crash of a United States Air Force B-52 bomber that caused the release of four thermonuclear weapons in the vicinity of Thule Air Force Base, Greenland, during the period beginning January 21, 1968, and ending September 25, 1968.

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